SUBJECT INDEX

Alphabetical List of Authorities

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.----------

CLARA E. HARE, ET AL., PETITIONERS

VS.

ALLEN W. HENDERSON, ET AL., RESPONDENTS

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The opinion of the Circuit Court of Appeals in this case is reported in 113 *Federal* (2d) 277.

Omission from the petition of important facts and what respondents conceive to be inaccurate statements therein compels a more extended reply than otherwise.

The plaintiffs (appellants in Circuit Court; petitioners here) made their designation of the contents of the record on appeal on February 15, 1940, (Record pp.55-56). The defendants made their designation on March 19, 1940, (Record pp. 61,62). The matters designated by defendants have never been included in the printed record. Because of the refusal of appellants to pay any attention to defendants' designation, defendants brought forward a full court reporter's record. Plaintiffs had filed only a partial stenographer's record. Paragraph six of defendants' designation requires the whole reporter's record to be brought

forward (Record 61-62.) This was never done because appellants would not pay for printing the record as required by the rules of the Circuit Court of Appeals (Rule 23). On oral argument the Court stated that instead of considering the Motion to Dismiss the Appeal because of Appellants' failure in this regard, the Court would consider the typewritten transcript. *That transcript is not before you; petitioners did not bring it here.*

Again, in this Court a complete record has not been brought up by Petitioners. They have not served respondents with a designation of the part of the record to be printed; hence respondents have not had an opportunity to file a designation. The first notice which respondents have had was the service of the Petition for Writ of Certiorari and the partial record on September 28, 1940.

Respondents again present, as in the Circuit Court of Appeals, that the record is incomplete, that it is not made up in accordance with the rules and therefore the case should not be considered.

* * * *

The facts found by the two lower courts correspond.

The following quotations from the opinion of the Circuit Court of Appeals show what the suit is about:

> "The suit was to recover the title and possession of 640 acres of land in Orange County, Texas. The claim of title was; a deed from defendant's parents, dated October 11, 1902, to Frank Mills, reciting $6,717.00, paid in cash and the reservation of a vendor's lien, to secure a note for $2,783.00; and a deed, dated October 24, 1912, from Mills to plaintiff Clara Hare, then Clara Brown." * * * (Rec. p. 65).

"The defenses were (1) that while the deed recited a cash consideration, no cash was paid but only a stock of (†) *worthless merchandise fraudulently misrepresented* by A. H. Brown, the plaintiff Clara Hare's first husband, at whose request and for whose benefit the deed was made to Mills and by him to plaintiff, and that nothing of value was ever paid for the land; and (2) that defendants as holders of the superior title, long ago had rescinded the sale, because of the 12 years failure to pay any part of the reserved vendor's lien note and the complete abandonment of the purchase. Defendants also alleged; that, thereafter defendants paid up the delinquent taxes on the land and have since paid taxes thereon, claimed the land as their own, and continuously exercised all the rights of dominion and ownership over it; whereas plaintiff, though taking deed to the property in 1902, subject to the payment of the vendor's lien had never recorded it or claimed under it but had wholly abandoned her obligations under the contract of purchase, and the land covered thereby; and that the bringing of the suit in 1938, after the third of a century abandonment, was brought about not by plaintiff's initiative, but as the result of advertisement and solicitation by interested persons whose interest had been directed to the land by the leasing of it for oil by the Sun Company." * * * * (Rec. p. 66).

"Briefly summarized, this is what was found. In 1902, following a newspaper advertisement, offering to swap merchandise for land, and correspondence between J. L. Henderson and A. H. Brown & Company, Henderson acquired a stock of merchandise from Brown & Company, and he and his wife by deed, dated October 11, 1902, and recorded in Orange County, October 23, 1902, conveyed the land in question to Frank Mills, as Brown's nominee. The deed

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Note: (†) Italics are by counsel for respondents.

recited a consideration of $9500, $6717 cash, $2783 secured to be paid by a note with a vendor's lien on the land expressed to secure the payment thereof. The note recited that it was given in part payment for the purchase money of the land and, that for the securing of it a vendor's lien was acknowledged. On October 24, 1902, Mills executed a deed to Clara Brown, the wife of J. H. Brown, but it was not recorded in Orange County until June 24, 1938. *In* 1904, *Brown and his associates in the partnership were indicted for fraud on account of this and several other transactions and were convicted and sentenced to the penitentiary as to some of them.* (Italics ours).

"*After the execution of the deed from Mills to her, Clara Brown not only did not evidence claim to the land by recording her deed, but she did not evidence it in any other way, nor did she make or offer to make, any payment of principal or interest on the note or taxes on the land. Between the years* 1909-1916, *she was in Orange, Beaumont, and Lufkin, Texas, but she never asserted any ownership or claim to the land or did anything in regard to it until certain advertisements of date, May* 29, 1938, *in the Kansas City Star, inquiring for her and her deceased husband's address and that of Mills, came to her attention. Then she contacted the lawyer whose name was signed to one of them and brought this suit.* (Italics ours).

"On Henderson's side, these things were done about the land. On April 23, 1904, Henderson wrote to attorneys in Orange to bring suit on the note but nothing was done about it. On April 24, 1908, in reply to an inquiry from Brown, he wrote advising him that he would accept the face amount of the note, waiving the $800 of accumulated interest and release the land or would give Brown $50 for the return of all papers, including the deed to Mills. Henderson died July 13, 1908, his wife September 9, 1909, both intestate, and

no administration was had on either of their estates.

"On November 14, 1914, a suit was brought by Allen Henderson, and the guardian of the three youngest children, against Frank Mills for rescission of the contract of sale and there was a judgment divesting title out of Mills and vesting it in the plaintiffs." (Rec. p. 66-67).

The judgment in the suit of the Henderson children, three by their Guardian, against Frank Mills for the land in controversy recited:

> *"And the defendant Frank Mills, though duly and legally cited in terms of law to appear and answer herein, came not, after being called at the Courthouse door of Orange County, Texas, but wholly made default."* (Rec. p. 37).

It further provides:

> *"And the Court after hearing the testimony and argument of the counsel is of the opinion that the law and the facts are with the plaintiff, and that they are entitled to recover herein."* (Record p. 37).

FACTS OMITTED FROM PETITION

(1) The petition does not tell you that Brown and his associates after obtaining this deed from Mr. Henderson were, as found by the District Court:

> "About the year 1904 A. H. Brown and the two Rickers were indicted in the United States District Court of Kansas City for *mail fraud in connection with this and several other transactions and were later tried and convicted at least as to some of such transactions, and sentenced to serve terms in the penitentiary.* Such sentences were affirmed upon appeal and they served terms in the penitentiary at Leavenworth, Kansas." (Record p. 34).

The Circuit Court of Appeals found:

> "*In* 1904, *Brown and his associates in the partnership were indicted for fraud on account of this and several other transactions and were convicted and sentenced to the penitentiary as to some of them.*" (Record p. 67).

(2) That Mrs. Hare, formerly Mrs. Brown, never asserted any claim to the land in controversy from the date of her deed until after the following occurred:

The District Court found:

> "There also appeared in the Kansas City Star on May 22, 1938, the following advertisement:
>
> "'WANTED—Present addresses of Albert H. Brown and wife, Clara E. Brown, or if dead, information relative to heirs. He worked for Greer Mills & Co. in 1902-3 and officed in Hall Building, 1904. Address A 17 Star.'
>
> "Shortly prior to the time of the foregoing advertisements there had been oil activity in the vicinity of this land, and, as alleged by plaintiffs, the value thereof had increased materially.
>
> "*The foregoing advertisements or similar advertisements came to the attention of Clara E. Hare, whose husband Brown, had died and who later married Hare. After seeing such advertisement she contacted the lawyer whose name was signed to one of same and he brought this suit for the land in question.*
>
> "Up to that time the deed from Frank Mills to Clara E. Brown had not been recorded in Orange County.
>
> "Clara Hare claims to have been in the vicinity of

this land between the years 1909 and 1916 in the carnival business at Orange, Beaumont and Lukfin, Texas, under the auspices of 'American Legion * * * different Committees * * * and different Orders,' but never did anything to evidence a claim of ownership therein." (Record p. 35).

The Circuit Court of Appeals found:

> *"After the execution of the deed from Mills to her, Clara Brown not only did not evidence claim to the land by recording her deed, but she did not evidence it in any other way, nor did she make or offer to make, any payment of principal or interest on the note or taxes on the land. Between the years* 1909-1916, *she was in Orange, Beaumont and Lufkin, Texas, but she never asserted any ownership or claim to the land or did anything in regard to it until certain advertisements of date, May* 29, 1938, *in the Kansas City Star, inquiring for her and her deceased husband's address and that of Mills, came to her attention. Then she contacted the lawyer whose name was signed to one of them and brought this suit."* (Record p. 67).

(3) The respondents have been active about their title: The Circuit Court found in this connection:

> "On November 14, 1914, a suit was brought by Allen Henderson, and the guardian of the three youngest children, against Frank Mills for rescission of the contract of sale and there was a judgment divesting title out of Mills and vesting it in the plaintiffs. In that suit no attorney was appointed to represent Mills; no evidence was actually offered in the court and no statement of facts was filed. After the entry of the judgment, the Hendersons continuously exercised acts of dominion and ownership over the land, executing oil leases, selling timber and paying taxes. The land was assessed as unknown from 1902 to 1918, but the record shows payment of back taxes by the Hender-

sons and the issuance to them in 1921, of a redemption certificate as to taxes for the years 1902-1918, and receipts for taxes for some of the later current years." Record pp. 67-68.)

POINTS AGAINST THE PETITION

1. Petitioners show a total misconception of the case when they attempt to present to you that the Circuit Court of Appeals and the Trial Court held that the judgment of Henderson against Mills denies to them due process of law. Due process of law is not in the case. *The basis of this is that Mrs. Hare and her first husband, Brown, never paid for the land, never asserted any title to it and that the Hendersons many, many years ago rescinded the executory contract of sale, and that petitioner abandoned any title she may have had.* Judge Hutcheson said:

> *"To allow plaintiffs, after nearly a third of a century of complete abandonment, and 25 years after timely rescission of the contract has occurred, to come in now, because of the supposed advance in value of the property, and take it from defendants, would be contrary to the uniform current of Texas authority. The language of the court in the Bunn case in sustaining the right of the vendor applies with peculiar force here.*
>
> "The judgment was right. It is
> "Affirmed." (Record pp. 71-72.)

The Texas authorities are perfectly plain that where land is not paid for by vendee and it is sold to a sub-vendee and the sub-vendee does not pay for it, that a rescission may be had, not only by filing suit but by many other acts. *Filing suit is one act of rescission.* See Thompson v. Robinson, 93 Tex. 165, 54 S. W. 243; Miller v. Horn, 149 S. W. 769; Evans v. Bently, 29 S. W. 497.

Acts besides filing suit held to be acts of rescission are:

(a) *Retaking possession by vendor*:

Lipscomb v. Fuqua, 103 Texas, 585; 131 S. W. 1061.
Burton v. Dumestre, 86 Fed. (2nd) 947. (Circuit Ct. Appeals, Texas.)

(b) *Conveyance by the vendor to some third person*:

McBride v. Banguss, 65 Tex. 174;
Sherring v. Augustus, 32 S. W. 450;
Scott & Carmody v. Canon, 240 S. W. 304;
Thompson v. Robinson, 93 Tex. 165, 54 S. W. 243;
Waggoner v. Tinney, 102 Tex. 254, 115 S. W. 1155, 138 S. W. 184;
Toler v. King, 11 S. W. (2d) 360;
Fullerton v. Scurry County, 143 S. W. 971;
Johnson v. Smith, 115 Tex. 193, 280 S. W. 158;
Rooney v. Porch, 223 S. W. 245, 329 S. W. 910, 275 S. W. 494;
Barker v. Temple Lumber Co., 120 Tex. 244, 37 S. W. (2d) 721;
Church v. Cocke, 120 Tex. 262, 37 S. W. (2d) 723.

(c) *Execution of an oil and gas lease by the vendor to some third person*:

Graham v. Nicholson, 51 S. W. (2d) 1053, (Appl. for writ of error dism.);
Investors Utility Corp. v. Challacombe, 39 S. W. (2d) 175;
Tilley v. Kangerga, 83 S. W. (2d) 787, (Appl. for writ of error ref.).

(d) *Corporate vendor passing resolution and taking possession*:

Fullerton v. Scurry County, 143 S. W. 971.

(e) *Rescission may be by parole*:

Johnson v. Smith, 115 Tex. 193, 280 S. W. 158.

(f) *Vendees' sub-vendee takes subject to vendor's right of rescission*:

Spencer v. May, 78 S. W. (2d) 665;
Scott & Carmody v. Canon, 240 S. W. 304;
Yett v. Houston Farms Development Co., 41 S. W. (2d) 305. (Appl. for writ of error refused);
Tom v. Wollhoefer, 61 Tex. 277;
Fullerton v. Scurry County, 143 S. W. 971;
Barker v. Temple Lumber Co., 120 Tex. 244, 37 S. W. (2d) 721;
Church v. Cocke, 120 Tex. 262, 37 S. W. (2d) 723;
Bothwell v. Farmers & Merchants State Bank & Trust Co., 118 S. W. (2d) 465.

(g) Rescission does not involve the consent of the vendee or someone holding under the vendee. Thus, in *Moye v. Goolsbee*, 124 S. W. (2d) 925, writ of error refused, the then owner of the claim to the land was insane, yet rescission was had by resumption of possession. The rights of minors holding under the vendee are subject to rescission.

Jackson v. Ivory, 30 S. W. 716;
Thompson v. Robinson, 93 Tex. 165, 54 S. W. 243, 77 Am. St. Rep. 843;
Williams v. Tooke, 116 S. W. (2d) 1114, 1124.

The suit by the Henderson children against Mills was instituted on November 14, 1914—four days before the 1913 Act requiring such action. (Appendix, page viii). This does not take into consideration the suspension of limitation for a year after the death of both Mr. and Mrs. Henderson. (Appendix, page xvii). It does not take into consideration the suspension of limitation because of the

fact that the plaintiffs were minors. (Appendix, page xvi). Even under the Act itself, without considering any suspensions, suit was timely instituted. Petitioners attempt to argue the case as though that suit had nothing to do with the rescission, yet, under the Texas authorities, as held by both the Texas Judges, in the District Court and in the Circuit Court of Appeals, the institution of that suit was in itself a rescission. Many additional acts constituting rescission appear, such as selling timber, executing oil and gas leases, and paying taxes.

The statutes involving such situations are discussed at great length in *Cathey v. Weaver,* 111 Texas, 515, 242 S. W. 447. These statutes are not retroactive, either by their terms or under the Texas decisions. The transaction before you arose in 1902, and hence statutes passed later, especially the 1931 statute involved in *Yates v. Darby,* 131 S. W. (2d) 95, urged upon you by petitioners, could not affect the situation.

All such statutes, prior to that of 1925, provided for limitation to be used only defensively in suits by the holder of vendor's lien notes. Such statutes had no application where the vendor had taken possession and vendee should bring suit for the land without paying for it. That is the case before you. See *Bunn v. City of Laredo,* 245 S. W. 426.

Stating it another way, the statute relied on by petitioners affects only a suit by vendor against vendee in any event, and has no effect upon suits by vendees against vendors, where the vendor has previously rescinded and taken possession, and vendee has not paid for the land.

Judge Hutcheson for the Circuit Court said:

"To allow plaintiffs, after nearly a third of a cen-

tury of complete abandonment, and 25 years after timely rescission of the contract has occurred, to come in now, because of the supposed advance in value of the property, and take it from defendants, would be contrary to the uniform current of Texas authority. The language of the court in the Bunn case in sustaining the right of the vendor applies with peculiar force here.

"The judgment was right. It is
"Affirmed." (Record pp. 71-72.)

2. Petitioners attempt to say that *Yates v. Darby,* 131 S. W. (2d) 95, by the Commission of Appeals, Section B, changes the foregoing rules of law. The trial Judge, a Texas Judge, and the Judge of the Circuit Court of Appeals, writing the opinion, another Texas Judge, do not so construe *Yates against Darby.* On the contrary Judge Hutcheson said:

"We agree with appellees. *Yates v. Darby* dealt with an attempted agreed rescission made between vendor and vendee, in February 1933, after a judgment had been fixed against the interest of the vendee. The court properly held that under Articles 5520-23, Revised Civil Statutes, 1925, as amended in 1931, providing 'purchase money on mortgage lien notes relating to real estate shall conclusively be presumed to be paid after four years from the date of maturity of such notes, unless extended as provided by law,' completely protected a third party, such as the judgment lien holder, against action by the vendor either upon the notes or by rescission in or out of court.

"In doing so, the court did not overrule or supersede the decisions, holding that as between the parties, the lien limitation statutes as enacted in 1905 and amended in 1913, which were in force when the Hendersons, within the time fixed by the statute for court action, rescinded the contract of purchase and took

back the land, did not destroy the vendor's superior title or prevent his effective reassertion of it by rescission against his vendor's default and particularly against his abandonment.

"It expressly approved and reaffirmed the long and unbroken line of decisions affirming the vendor's right of protection by a timely rescission against a defaulting vendee and his successors in title. Bunn v. City of Laredo; Benn v. Security Realty & Development Co., note supra; Jasper State Bank v. Braswell. Nothing in it in any manner impairs or defeats the application here of the principle laid down and applied in these cases and in Thompson v. Robertson, 54 S. W. 243, that where the vendor has rescinded the contract and there has been long and complete abandonment by the vendee so that there are no equities in his favor, he will not be accorded the right to sue for the land either with or without the unpaid purchase money, but will be left where the action of rescission and his own conduct have left him, without right or title to the property. *It would be difficult to imagine a case more devoid of equities than this one.*" (Record pp. 69-71.)

3. Both the lower courts held that Mrs. Hare—formerly Mrs. Brown—long since abandoned this title. That was a question of fact, and the two lower courts are agreed on such question of fact.

The abandonment and the rescission each took effect many years before the 1931 amendment discussed in *Yates v. Darby* occurred, and such questions of fact cannot now be reviewed by this court, especially where both lower courts agree thereon.

4. Another point decisive of this case is that when the chain of events involved started, the property in question

was separate property of Mrs. Henderson. (Record p. 31.) The deed was drawn in Texas and taken by Mr. Henderson to Kansas City, where the swap for worthless merchandise occurred. (Record pp. 31, 32.) Apparently the grantee's name was blank and Mills' name was later inserted in the deed. (Record p. 32.) Some change in the consideration for the conveyance was made after Mr. Henderson reached Kansas City. (Record p. 33.) Mrs. Henderson and her husband acknowledged the deed in Texas.

The deed had the grantee's name in blank. The consideration was to be merchandise, and a note, as stated. A deed delivered for a different consideration could not pass her title.

Thus, in *Gulf Production Company v. Continental Oil Company,* 132 S. W. (2d) 553, rentals on an oil and gas lease on the homestead were held not payable in stock, instead of money, as provided in the lease.

Transmission of the title to homestead was involved, and an oil lease was executed requiring money rentals to be paid. Instead of money rentals being paid, stock was given. The court held that the change in the consideration required a new acknowledgment. So here, Mrs. Henderson acknowledged the deed in blank, as found by the Court, and title did not pass to permit a different consideration, from that upon which she was conveying her separate property.

5. The attack here is collateral, not direct. The recitation of service in the decree enforces verity under Texas law and can not be impeached in a collateral proceeding. See

Levy v. Roper, 113 Tex. 356, 256 S. W. 251;
Brown v. Clippinger, 113 Tex. 364, 256 S. W. 254;
Chapman v. Kellogg, 252 S. W. 151;
State Mortgage Corp. v. Traylor, 120 Tex. 148, 36 S. W. (2d) 440;
Switzer v. Smith, 300 S. W. 31.

The fact that evidence was not introduced is not permissible in such collateral attack, especially where the judgment recites the fact that evidence was introduced. Failure to appoint an attorney or file a statement of facts are not matters that can be raised after so long a time but are mere irregularities in the proceedings.

Cornelius v. Early, 24 S. W. (2d) 757;
Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778.

Under the Texas statute service by publication is the only manner which service could be had upon a non-resident.

Erwin v. Holliday, 131 Tex. 69, 112 S. W. (2d) 177.

It is respectfully submitted that the petition for certiorari should be in all things denied.

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